Supreme Court, U.S.
FILED
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No. 01-928

In The

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

ESTATE OF FRANK A. BRANSON, DECEASED,
MARY M. MARCH, EXECUTOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tax Court, in redetermining a deficiency in estate tax, may apply the doctrine of equitable recoupment to take into account the income tax overpayment for the same tax year that results from its redetermination of the deficiency.

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STATEMENT

The facts are as stated in the Petition for Writ of Certiorari ("Petition") filed by the Commissioner of Internal Revenue ("Commissioner"). Respondent does not adopt the Commissioner's explanation of the Ninth Circuit Court of Appeals' rationale for its decision and respectfully submits that the opinion below is self-explanatory.

SUMMARY OF ARGUMENT

The Commissioner contends this Court should grant a writ of certiorari because the decision below conflicts with *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), and with a decision of the Sixth Circuit Court of Appeals, *Estate of Mueller v. Commissioner*, 153 F.3d 302 (6th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999). In fact, there is no real conflict: Both those decisions involved a different question than the one properly presented here. The question here is narrower than the one urged by the Commissioner, and Respondent has found no other reported decision that addresses it. This relatively unimportant case should not command the scarce resources of this Court. The petition should be denied.

WHY THE PETITION SHOULD BE DENIED

A. The Petition Presents The Wrong Question.

The Commissioner's formulation of the question presented differs from Respondent's in one salient respect:

The question articulated by Respondent is limited to cases in which the estate tax deficiency to be redetermined and the income tax overpayment to be recouped arise *in the same tax year*. The same-year limitation is critical because of the statutory and case law context: A different result obtains where the taxes arise in different years, as discussed below.

B. The Decision Below Does Not Conflict With Any Holding of This Court.

The Commissioner claims that certiorari is appropriate because the decision below conflicts with the reasoning and conclusion reached by this Court in *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943). Petition at 10, 14-16. There is no conflict.

In *Gooch Milling*, an audit of the taxpayer's books conducted in 1938 revealed that it had previously conducted an erroneous valuation of its inventory. Because of this error, the taxpayer had overpaid its income taxes for 1935 and had underpaid its income taxes for 1936. Although the time for the taxpayer to amend its 1935 income tax return had passed, the time for the Commissioner to issue a deficiency notice in connection with the 1936 return had not. The Commissioner did so, and the taxpayer appealed to the Board of Tax Appeals, a predecessor of the modern-day Tax Court. *Gooch Milling*, 320 U.S. at 419.

The taxpayer requested that its 1935 overpayment be recouped against the 1936 deficiency sought by the Commissioner. The Commissioner objected. Internal Revenue

Code § 272(g) provided that in determining a deficiency that arose in one tax year, the Board "shall have no jurisdiction to determine whether or not the tax for *any other taxable year* has been overpaid or underpaid." (Emphasis added). The Board agreed with the Commissioner. However, the Eighth Circuit reversed the decision of the Board, and the Commissioner then obtained a writ of certiorari. *Gooch Milling*, 320 U.S. at 418-419.

This Court held that under the facts presented the Board of Tax Appeals could not apply the doctrine of equitable recoupment. The Court relied upon section 272(g) to hold that "[t]he Board is confined to a determination of the amount of deficiency overpayment *for the particular tax year* as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment." *Gooch Milling*, 320 U.S. at 420 (emphasis added). Thus:

> The Board's want of jurisdiction to apply the doctrine of equitable recoupment in this case is manifest from these statutory provisions. The Commissioner assessed a deficiency only for the 1936 fiscal year and it was this assessment of which the respondent sought a review. The Board thus had jurisdiction to do no more than redetermine the 1936 deficiency distinct from any overpayment or underpayment in any prior or subsequent year.

Id. This Court's opinion went on to make quite clear that its holding proceeded from the statutory prohibition against recouping across multiple years:

> Before § 272(g) of the Internal Revenue Code was enacted, the Board held that it had jurisdiction to determine an overpayment for a year as to which no deficiency had been found by the Commissioner and to apply that overpayment against the liability for the year as to which he had found a deficiency, thus giving effect to the doctrine of equitable recoupment. *Appeal of E.J. Barry*, 1 B.T.A. 156. Soon thereafter, however, Congress passed § 274(g) of the Revenue Act of 1926 (now § 272(g) of the Internal Revenue Code) taking such jurisdiction away from the Board.

Gooch Milling, 320 U.S. at 421 n.7.

> Until Congress deems it advisable to allow the Board to determine the overpayment or underpayment in any taxable year other than the year for which a deficiency has been asserted, the Board must remain impotent when the plea of equitable recoupment is based upon an overpayment or underpayment in such other year.

Id. at 422.

The present case involves, in contrast, a deficiency and an overpayment that arose in the same year. The *Gooch Milling* Court did not have before it the question whether the Board was prohibited from applying the doctrine of equitable recoupment when the deficiency and overpayment arose in the same year. Section 272(g) of the Internal Revenue Code – the principal ground for the Court's opinion in *Gooch Milling* – also did not speak to that question. Therefore, *Gooch Milling* did not address,

much less answer, the same-year question that is posed in this case.[1]

Section 272(g) has since been superceded by § 6214(b) of the Internal Revenue Code, and the Board of Tax Appeals has been replaced by the modern-day Tax Court. Section 6214(b) restricts the Tax Court's power to determine whether taxes *in other years* have been overpaid or underpaid when it is redetermining the deficiency of any income or gift tax. The Tax Court's redetermination of Respondent's 1992 estate tax deficiency led to a corollary change in 1992 income tax liability. Thus this case involves the recoupment of taxes arising *in the same year*. Section 6214(b) is therefore inapplicable, as the court below held (Petition App. 14a) and as the Commissioner concedes (Petition at 20).

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[1] The Commissioner correctly points out that in *Rothensies v. Electrical Storage Battery Co.*, 329 U.S. 296, 303 (1946), this Court (without discussion) cited *Gooch Milling* for the proposition that the Tax Court has no jurisdiction to consider recoupment. Petition, at 5-6, 16. However, *Rothensies*, like *Gooch Milling*, involved a taxpayer attempting to recoup an overpayment against a deficiency that occurred in a different year. *Rothensies*, 329 U.S. at 302. Respondent believes the Court in *Rothensies* meant merely that *Gooch Milling* stands for the (unexceptional) proposition that the Tax Court could not consider recoupment under the different-year facts there presented.

Each of the other cases cited by the Commissioner for the Tax Court's lack of jurisdiction likewise involved efforts to recoup overpayments against deficiencies arising in different years. Petition at 16, citing *Elbert v. Johnson*, 164 F.2d 421, 424 (2nd Cir. 1947); *Mohawk Petroleum Co. v. Commissioner*, 148 F.2d 957, 959 (9th Cir. 1945); *Wiener Machinery Co., Inc. v. Commissioner*, 16 T.C. 48, 54 (1951).

In sum, *Gooch Milling* relied on a statute that did not address this case; that statute has been superseded; and the present statute also does not address this case. *Gooch Milling* does not conflict with the decision below; it is simply inapplicable.

C. The Sixth Circuit's Holding in *Mueller* Does Not Concern the Present Question.

The Commissioner also claims the decision below conflicts with *Estate of Mueller v. Commissioner*, 153 F.3d 302 (6th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999). However, *Mueller*, like *Gooch Milling*, involved an effort to recoup tax liabilities arising in two different years.

In *Mueller* an undervaluation of stock resulted in the underpayment of estate tax and overpayment of income tax. The tax deficiency and the tax overpayment arose in different tax years, *see* 153 F.3d at 303, just as they had in *Gooch Milling*. The Commissioner issued a deficiency notice in connection with the estate tax underpayment. The taxpayer appealed to the Tax Court, and the Tax Court held that it had the power to allow equitable recoupment of the income tax overpayment against any estate tax deficiency. 153 F.3d at 303-04.

The Sixth Circuit overturned that holding, relying heavily on *Gooch Milling* and § 6214(b) of the Internal Revenue Code. *See* 153 F.3d at 305-06. As explained above, *Gooch Milling* and § 6214(b) are inapposite to the present case, where a same-year situation is instead presented. The holding in *Mueller* is similarly inapposite to the same-year question presented here. The Ninth Circuit

properly recognized that fact and was careful to state that its holding in this case did not address the facts posed by *Mueller*:

> We also note, however, that in *Mueller* the taxpayer sought recoupment of an income tax overpayment that was made in a different tax year from the estate tax deficiency before the Tax Court. *Id.* at 302 (redetermination of value of stock created an overpayment "in a previous year"). We have no occasion to pass upon the question whether the Tax Court would have jurisdiction to consider an equitable recoupment claim where the tax sought to be recouped was from a previous tax year.

Petition App. 16a n.5.

To the extent *Mueller* addresses the circumstances of this case, it therefore does so in dicta. Respondent believes that that dicta is erroneous, but in any event dicta does not create real conflict. This Court ought not devote its scarce resources to the correction of dicta in the opinions of lower courts.

D. This Case Does Not Present a Question of Great Importance.

The Commissioner also represents that review is warranted due to the "recurring" nature of the issue presented. Petition at 10, 23. There is no support in the record for this argument.

As shown, the question stated in the Petition conflates the same-year and different-year issues and is therefore broader than the question actually presented here.

The Petition cites only 14 cases. Not all of them concern the availability of equitable recoupment, and even fewer concern the Tax Court's application of the doctrine. Moreover, all that do deal with the Tax Court's application of equitable recoupment pose the different-year question, not the same-year question. The Petition cites *no* case, and Respondent has found none, in which the same-year question that is presented here has arisen before.

The Tax Court and its predecessors have been in existence for nearly eighty years.[2] A question that arises only once in nearly eighty years does not warrant this Court's review due to its "recurring" nature.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals in this case does not conflict with any holding of this Court or of any other Circuit. The question here posed does not arise with sufficient frequency to be said for that reason to be important. The Petition should be denied.

Respectfully submitted,

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[2] Revenue Act of 1924, Ch. 234, 43 Stat. 253, 336.